Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1998

HENRY GREEN,

Petitioner,

v.

SANDRA BARRINGER MORTHAM,
Secretary of State, State of Florida,
in her official capacity,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether large filing fees for party primaries are subject to close or deferential constitutional scrutiny?

II. Whether state-mandated filing fees for party primaries are insulated from constitutional scrutiny by nonmonetary alternatives?

III. Whether proof that some candidates access the ballot is sufficient to show that a state's restrictions are necessary?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Henry Green, respectfully petitions the Court for a writ of certiorari to review the final judgment of the United States Court of Appeals for the Eleventh Circuit, entered September 24, 1998, affirming summary judgment for the Respondent.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is reported at 155 F.3d 1332 (11th Cir. 1998) (App., *infra*, 1). The opinion of the United States District Court for the Middle District of Florida is reported at 989 F. Supp. 1451 (M.D. Fla. 1998) (App., *infra*, 18).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on September 24, 1998. The Eleventh Circuit denied Petitioner's timely Suggestion of Rehearing En Banc (treated as a Petition for Rehearing, *see* Eleventh Circuit Rule 35-6) on November 25, 1998. (App., *infra*, 45). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

In order to run as a major party candidate in Congressional (House)[1] elections, Florida law requires that a candidate first participate in and win a party primary. One who wishes to run in a party primary, in turn, is required to pay a "filing fee" to the Florida Secretary of State. *See* Fla. Stat. Ann. § 99.092(1) (West 1996).

Florida's filing fee for Congressional office is far and away the most onerous in the nation. Like many states, Florida expresses its fee as a percentage of the Congressional salary. However, unlike the forty-four states[2] that charged 1% of the Congressional salary or less, Florida charged 7½% of the Congressional salary in 1996 ($10,020). Only Georgia's requirement of 3%[3] in 1996 ($4008) approached Florida's fee. The other forty-nine states either required no fee, allowed the parties to determine the amount,[4] or demanded well under half Florida's requirement.[5]

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[1] Throughout this Petition, "Congressional" refers only to elections involving the United States House of Representatives.

[2] Forty-four states either charged no fee in 1996 or charged 1% of the congressional salary ($1336) or less. *See* Brown, *Popularizing Ballot Access: The Front Door to Election Reform*, 58 Ohio St. L.J. 1281, 1296-98 & nn. 62-67 (1997).

[3] *See* Ga. Code Ann. § 21-2-131(a)(2) (1993).

[4] No party set a fee greater than one-half Florida's. Alabama allowed parties to set fees not exceeding 2% of the Congressional salary. Ala. Code § 17-16-15 (1995). Arkansas allowed its parties to set fees without limits. Ark. Code Ann. § 7-7-301 (Michie 1993). The Democratic and Republican parties in Arkansas charged $5000 and $3500, respectively, for Congressional primaries in 1996. Brown, *supra* note 2, at 1297-98 n.65.

[5] Along with Florida and Georgia, only Texas, Tex. Elec. Code Ann. § 172.024(a)(3) (West Supp. 1997) (setting fee at

Like most states, Florida allows alternative access to its primary ballots. Rather than pay the required fee, a candidate can collect signatures from 3 percent of the registered party members in the district. Fla. Stat. Ann. § 99.095(3). The Democratic primary for Florida's Tenth Congressional District required 4077 signatures in 1996; Democratic primaries in Florida, on average, required 4233 signatures that year.[6] The number of signatures demanded by Florida for the Tenth Congressional District in 1996 exceeded by many times the raw number of signatures required in the vast majority of states. Only eight states required even half the number of signatures demanded by Florida. *See* Brown, *supra* note 2, at 1303 n.99. These eight states, meanwhile, all charged fees that were well under half Florida's.[7]

$2500) and Virginia, Va. Code Ann. §§ 24.2-523 & 24.2-521.2 (Michie 1993) (setting 2% figure, but allowing parties to choose conventions), required fees exceeding $1336. New Hampshire charged $5000, but reduced this figure to $50 if the candidate agreed to campaign spending limits. N.H. Rev. Stat. Ann. §§ 655:19 & 655:19-c.I(b) (1996).

[6] Republican Congressional primaries in Florida, on average, required 3583 signatures.

[7] California alternatively required 3000 signatures in 1996 and charged a fee of 1%. *See* Cal. Elec. Code §§ 8104(b) & 8106(a)(2) (West 1996). Delaware required signatures from 1% of the registered voters in the District, 3828 signatures in 1996; alternatively, one could pay a fee not to exceed 1% of the salary. *See* Del. Code Ann., tit. 15, §§ 3103(b) & (d) (1993). Georgia alternatively charged $4008 or allowed signatures from 1% of the voters for that office, between 2661 and 2780 in 1996. *See* Ga. Code Ann. § 21-132(g) (1993); Brief for Appellant at 42 n.46. Missouri required either signatures from voters equal to 1% of the votes cast in the last election (between 1503 and 2303 in

On June 12, 1996,[8] Henry Green filed this action under 42 U.S.C. § 1983 in an effort to have his name added to the Democratic primary ballot for Florida's Tenth Congressional District. When suit was filed, Green lacked the financial resources to meet Florida's $10,020 fee. He alleged that he could not "without undue hardship raise and pay the filing fee," and could not "without undue hardship secure the number of signatures currently required by § 99.095 in order to gain access to the primary ballot." *See* First Amended Complaint at 5. Two $5000 contributions made eight days later, however, provided Green with enough money to pay the fee under protest. Green thereafter amended his Complaint to seek both prospective relief[9] and return of his

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1996), *see* Mo. Rev. Stat. § 115.357.3 (1997), or $100. *Id.* § 115.357.1(1) (1997). While North Carolina, Montana, Oklahoma and West Virginia all required potentially more signatures than Florida, their fees ranged from only $750 to 1% of the Congressional salary. *See* N.C. Gen. Stat. § 163-107(a) (1996) (1% of salary); Mont. Code Ann. § 13-10-202(3) (1993) (same); W.Va. Code § 3-5-8(a) (1994) (same); Okla. Stat. tit. 26, § 5-112 (1997) ($750).

[8] Fees are paid in the spring of each election year, with signatures due three weeks earlier. In 1996 the signature and fee deadlines were set for April 15 and May 10, respectively. Litigation involving racial gerrymandering in Florida's Third Congressional District, however, postponed these deadlines until June 10 and 21, 1996.

[9] Florida reduced its fee to 6% following the 1996 election. Because Green alleged that he intended to run again for Congress, the District Court properly found he had standing to seek prospective relief. In September 1998 (while his appeal was pending) Green moved outside the state. Green notified the Eleventh Circuit of his changed residence on September 17, 1998, suggested that his claim to prospective relief might be

fee.[10] Green ran unopposed in the primary and ultimately lost the general election.

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rendered moot, and (if so) moved the court to vacate that part of the District Court's judgment addressing Florida's fee for the 1998 elections. *See U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994). The Eleventh Circuit ruled on September 24, 1998, in a separate order and without elaboration, that Green's claim to prospective relief was not moot. Because Green seeks the return of his filing fee, moreover, his challenge to Florida's 1996 election laws are not affected even if his prospective claim were rendered moot.

[10] The State admitted the allegations in Green's Amended Complaint, conceded Green's standing, and raised no Eleventh Amendment defense in either the District or Circuit Courts. The Court need not raise the Eleventh Amendment *sua sponte*. *See Patsy v. Board of Regents*, 457 U.S. 496, 515 n.19 (1982) ("we have never held that [the Eleventh Amendment] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."). Because the Florida Attorney General's Office, moreover, is vested with broad common law powers, *see State of Florida v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976) (interpreting Florida law to grant state attorney general broad common law powers); *Thompson v. Wainwright*, 714 F.2d 1495 (11th Cir. 1983) (same), it has the power to defend an action seeking retrospective relief in federal court. *See Ford Motor Company v. Department of Treasury of Indiana*, 323 U.S. 459, 467 (1945) (holding that "administrative and executive officers" who possess broad common law authority have power to waive state's immunity). Coupled with its broad common law powers, the Attorney General's defending this action on the merits amounts to a waiver of Eleventh Amendment immunity. *See, e.g., Sosna v. Iowa*, 419 U.S. 393, 396 n.2 (1975) (holding that under Iowa law "the State consents to suit and waives any defense of sovereign immunity by entering a voluntary appearance and defending a suit on the merits."). Additionally, because only $3228.20 of Green's fee was placed in general revenue – the rest being disbursed among an Election Commission Trust Fund, an Election Campaign Financing Trust

The United States District Court for the Middle District of Florida (Pizzo, Magistrate Judge) granted Summary Judgment for Florida. The Eleventh Circuit (Tjoflat, Cox and Hull, JJ.) affirmed. It held that Eleventh Circuit precedent established a balancing test for ballot access "rang[ing] from strict scrutiny to a rational basis analysis, depending on the circumstances." *Green v. Mortham*, 155 F.3d 1332, 1336 (11th Cir. 1998); (App., *infra*, 10) (citations omitted). Because Florida's filing fee for Congressional office was not "severe," the court eschewed heightened scrutiny in favor of asking only whether the fee was "reasonable [and] nondiscriminatory." *Id.* at 1337; (App., *infra*, 11). Applying this deferential analysis, the court concluded that "[t]here is a range of fees . . . that are constitutional, and the Florida legislature is free to choose its ballot access requirements from that constitutional spectrum. The fact that Florida may be at the high end of that range does not make its ballot access restrictions unconstitutional." *Id.* at 1339; (App., *infra*, 16). The Eleventh Circuit found support for its conclusion in both Florida's signature alternative, *id.* at 1337; (App., *infra*, 11), and candidates having qualified in Florida under existing standards. *Id.*; (App., *infra*, 12).

Fund, and the Democratic Party, *see* Fla. Stat. Ann. §§ 99.092(1) & 99.103 (West 1996) – at least part of Green's fee is not protected by the Eleventh Amendment. *See, e.g., Gallagher v. Evans*, 536 F.2d 899, 901 (10th Cir. 1976) (holding that the Eleventh Amendment does not protect fees deposited in "candidates' suspense fund" or held by county treasurer). There is no question but that the Florida Democratic Party, which received part of Green's fee, is not protected by the Eleventh Amendment.

REASONS FOR GRANTING THE PETITION

I. THE ELEVENTH CIRCUIT'S "REASONABLENESS" TEST CONTRADICTS THE CASE LAW OF THIS COURT AND CONFLICTS WITH RULINGS IN THE OTHER FEDERAL COURTS OF APPEALS.

The appropriate standard of review for filing fees has generated a split among the Circuits. While the Eleventh Circuit in *Green* applied a "reasonableness" test – the equivalent of rationality review – the Fourth Circuit has employed closer scrutiny to strike down a $150 filing fee for elective office. *Dixon v. Maryland State Adm. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989). *Dixon* rejected the District Court's use of a rational basis test, *see* 686 F. Supp. 539, 541 (D.Md. 1988), in favor of the careful scrutiny demanded by *Bullock v. Carter*, 405 U.S. 134 (1972). Similarly, the Eighth Circuit has applied *Bullock*'s close judicial scrutiny to strike down an Arkansas requirement forcing parties to pay for political primaries. *See Republican Party of Arkansas v. Faulkner County*, 49 F.3d 1289, 1301 (8th Cir. 1995). Because the Eleventh Circuit's reasonableness test disregards *Bullock* and contradicts the decisions of the Fourth and Eighth Circuits, *see* Supreme Court Rules 10(a), and 10(c) certiorari should be granted to decide the appropriate level of scrutiny.

This Court first addressed filing fees in *Bullock v. Carter*, 405 U.S. 134 (1972), where it unanimously struck down a series of Texas filing fees ranging from $1424.60 for County Commissioner to $8900 for District Judge. 405 U.S. at 135-36, 138 n.11. Two years later, in *Lubin v. Panish*,

415 U.S. 709 (1974), the Court struck down a more modest California requirement that Congressional candidates pay $425 (1% of the Congressional salary) in order to run in their parties' primaries. In both *Bullock*, 405 U.S. at 146, and *Lubin*, 415 U.S. at 717, the Court's analysis modeled strict scrutiny. In neither case was the Court impressed by the argument that large fees were needed to deter frivolous candidacies, and it rejected outright the notion that fees are a permissible method of off-setting the costs of elections. *Bullock*, 405 U.S. at 147-48.

While the Supreme Court in *Bullock* and *Lubin* spoke of "closely scrutinizing" filing fees, *see, e.g.*, 405 U.S. at 144, the Eleventh Circuit found that more recent Supreme Court precedent allows a relaxed analysis. Relying on *Anderson v. Celebrezze*, 460 U.S. 780 (1983), which invalidated Ohio's restrictions on independent access to the general Presidential ballot, and *Burdick v. Takushi*, 504 U.S. 428 (1992), which upheld Hawaii's exclusion of write-in candidates from general election ballots, the court concluded that filing fees need only be "reasonable [and] non-discriminatory." 155 F.3d at 1336; (App., *infra*, 11). Under this standard, the court held that "Florida's qualifying fee of seven and a half percent of the annual salary of the office sought in 1996 is reasonable." *Id.* at 1337.

The Eleventh Circuit's holding, premised on a finding that Florida's filing fee is not "severe", contradicts *Bullock* and *Lubin* and ignores this Court's more recent election jurisprudence. This Court has consistently held that large filing fees are "severe" burdens that warrant careful scrutiny. In *Timmons v. Twin Cities Area New Party*, 117 S. Ct. 1364, 1370 (1997), which sustained a Minnesota

anti-fusion law (prohibiting more than one party from endorsing a candidate), the Court distinguished "severe" from "lesser" burdens by citing *Bullock*. 117 S. Ct. at 1371. This same point was made in *M.L.B. v. S.L.J.*, 117 S. Ct. 555 (1996), which struck down judicial filing fees in the context of terminating parental rights. While observing that filing fees are ordinarily subject to minimal scrutiny, the Court pointed to *Bullock* as a notable exception:

> The State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement; States are not forced by the Constitution to adjust all tolls to account for "disparity in material circumstances." But our cases solidly establish two exceptions to that general rule. *The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.*

Id. at 567-58 & n.14 (emphasis added) (citing *Bullock*).

Unlike the restrictions on write-in and fusion candidates that were at issue in *Burdick* and *Timmons*, large filing fees go beyond directing *how* candidates reach the ballot; they instead *exclude* candidates completely. Because Hawaii's[11] and Minnesota's[12] primaries were (and still are) among the most accessible in the country, those states' prohibitions on write-in candidacies and political fusion, respectively, were not severe. In either

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[11] Hawaii charges only a $75 fee and requires only 25 signatures in order to run in Congressional primaries. *See* Hawaii Rev. Stat. §§ 12-5(a) & 12-6(b)(1) (1993).

[12] Minnesota charges either a $300 fee, *see* Minn. Stat. Ann. § 204B.11(1)(a) (West Supp. 1997), or requires 1000 signatures in order to run in Congressional primaries. *See id.* § 204B.11(2)(b).

state, candidates could easily run under the party banner of their choosing. A $10,020 filing fee – demanded before one can run in either party's primary – is a different matter.

In *Buckley v. American Constitutional Law Foundation*, No. 97-930, slip op. at 7 (U.S. Jan. 12, 1999), which struck down Colorado's requirement that petition circulators be registered voters, the Court cautioned that "the First Amendment requires [the Court] to be vigilant in making those judgments [about severity], to guard against undue hindrances to political conversation and the exchange of ideas." Unlike the Eleventh Circuit, the Court in *Buckley* was careful to assess the severity of the burden in light of the entire record. "[I]t is scarcely debatable given the uncontested numbers," the Court stated, that Colorado's restriction "decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators." *Id.* at 10. Since the record indicated that many potential circulators were excluded, the Court readily recognized the severity of the burden. *Id.* at 11.

Uncontested data shows not only that Florida has one of the lowest candidate-to-primary ratios in the United States, but also how draconian Florida's restrictions are. Between 1990 and 1998, on average, just over one candidate (1.25) qualified for each Congressional primary in Florida. *See* 155 F.3d at 1335 (table); (App., *infra*, 7). Indeed, only 29 candidates ran in Florida's 46 Congressional primaries in 1998. *Id.* The vast majority of states experienced not only significantly larger candidate-to-primary ratios, *see* Brown, *supra* note 3, at 1312 (finding that states charging between $500 and $1336, $100 and

$500, and less than $100 for Congressional primary ballot access, have 1.74, 1.82, and 3.31 candidates per primary, respectively), but also a greater percentage of contested elections. *Id.* Green's allegations, taken as true, establish that he could not "without undue hardship raise and pay the filing fee," nor could he "without undue hardship secure the number of [required] signatures. . . . " *See* First Amended Complaint at 5. Moreover, an affidavit from the Pinellas County Democratic Executive Director, stating that he "encountered several individuals who, but for the high filing fees, would have run for elective office in 1996," *see* Plaintiff's Motion for Summary Judgment, Exhibit B, established that others were excluded. The unchallenged evidence shows that Florida's requirements are severe.

Florida's requiring large fees of candidates running in *primaries* strikes at the heart of freedom of association. *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), which involved the legality of a $45 delegate fee charged by the Republican Party of Virginia, held that governmental intrusions of this nature are subject to heightened scrutiny. Although the Court divided over whether the $45 fee violated § 5 of the Voting Rights Act, all agreed that § 5's prohibition of such a fee presented serious First Amendment difficulties. Justice Stevens stated that "the right of association of members of a political party is a basic constitutional freedom and [ ] governmental action that may have the effect of curtailing freedom to associate is subject to the closest scrutiny." *Id.* at 228 (Stevens, J.). Justice Kennedy added that "[t]he first amendment questions presented by governmental intrusion into political party functions are . . . a reason for caution. . . . " *Id.* at

249 (Kennedy, J., dissenting). Justice Thomas opined that "§ 5 burdens the rights of the Party and its members to freedom of political association." *Id.* at 283 (Thomas, J., dissenting). Justice Scalia stated: "Any interference with the freedom of a party is simultaneously an interference with the freedom of its adherents. For that reason, we have always treated government assertion of control over the internal affairs of political parties – which, after all, are simply groups of like-minded individual voters – as a matter of the utmost constitutional consequence." *Id.* at 241 (Scalia, J., dissenting).

Far from treating the matter as "of the utmost constitutional consequence," the Eleventh Circuit inquired only into the "reasonableness" of Florida's fee. Faced with a fee more than twice as large as that required by any other state, and more than six times as large as the fees charged by forty-four states, the Eleventh Circuit stated only that "[t]here is a range of fees . . . that are constitutional, and the Florida legislature is free to choose its ballot access requirements from that constitutional spectrum." 155 F.3d at 1338 (App., *infra*, 16). This lax approach cannot be squared with *Bullock*, *Buckley* and *Morse*.

II. THE ELEVENTH CIRCUIT'S CONCLUSION THAT NON-MONETARY ALTERNATIVES INSULATE FILING FEES FROM JUDICIAL SCRUTINY IS INCONSISTENT WITH THIS COURT'S PRECEDENT AND CONFLICTS WITH DECISIONS OF THE FOURTH CIRCUIT.

Whether non-monetary alternatives save filing fees has generated a split among the Circuits. The Eleventh Circuit held that "so long as there is an alternative means

of ballot access as exists in Florida's signature petition alternative," 155 F.3d at 1336 (App., *infra*, 11), Florida's $10,020 fee proved "reasonable, nondiscriminatory" and valid. *Id. See also Andress v. Reed*, 880 F.2d 239 (9th Cir. 1989) (upholding California's modest Senatorial filing fee in light of a signature alternative). The Fourth Circuit, in contrast, has held that non-monetary alternatives, such as a complete fee waiver for indigent candidates, cannot save a filing fee that fails *Bullock*. In *Dixon v. Maryland State Adm. Bd. of Election Laws*, 878 F.2d 776 (4th Cir. 1989), the court struck down a $150 filing fee notwithstanding an outright waiver for indigence. It rejected the lower court's conclusion that the alternative justified applying only a rational basis test. *See* 686 F. Supp. 539, 541 (D.Md. 1988). "[W]e hold that Maryland's write-in candidate filing fee is not a sufficiently narrowly drawn method of advancing the State's . . . interest in light of the burden on rights of association that this method imposes." 878 F.2d at 784. Because of this conflict with the Fourth Circuit, *see* Supreme Court Rule 10(a), and because the issue has yet to be answered by this Court, *see* Supreme Court Rule 10(c), certiorari should be granted.

In striking down California's fee system, the *Lubin* Court stated that "reasonable alternative means of ballot access" were needed to support fees, 415 U.S. at 718, and suggested that a viable alternative might be "persuading a substantial number of voters to sign a petition in his behalf." *Id.* at 718-19. The Eleventh Circuit concluded from the latter dicta that so long as there exists an alternative, the state can charge whatever it likes. This Court, however, has never held that non-monetary alternatives

necessarily insulate filing fees from judicial scrutiny. In *Bullock*, the Court noted that Texas's amended ballot access law, which allowed candidates to alternatively access primaries by gathering signatures, was also being challenged, but "intimate[d] no view on the merits of that controversy." 405 U.S. at 141 n.17. The *Bullock* Court rejected outright the claim that alternative access to the *general* election ballot via signature collection saved Texas's fees, 405 U.S. at 146-47, and two years later in *Lubin* found "dubious at best" the claim that write-in candidacies could cure unconstitutional fees. 415 U.S. at 719 n.5.

The most that can be said then is that non-monetary access is *required* if a state charges a fee. Put another way, non-monetary access is *necessary* though not *sufficient*. Just as independent access via signature collection is insufficient, *Bullock*, 405 U.S. at 146-47, and the availability of write-in space offers a "dubious" option, *Lubin*, 415 U.S. at 146-47, signature alternatives for primaries can not insulate fees from judicial scrutiny. If it were otherwise, states would have an open invitation to write illusory access laws that are beyond the reach of common citizens. Candidates could be frozen out by theoretical signature alternatives that no one can realistically use.

Florida has done exactly that. Ninety percent of Florida's Congressional candidates qualify by paying the fee.[13] Signature collection in Florida is so onerous that

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[13] Between 1978 and 1988, 299 candidates qualified for Congressional primaries. *See* 155 F.3d at 1335 (App., *infra*, 6). All paid the fee. Between 1990 and 1998, when Florida's fee increased dramatically, 278 qualified; only 65 gathered signatures. *See* 155 F.3d at 1335 (table) (App., *infra*, 7).

80% of those potential candidates who attempt to collect signatures fail. *See* Brief for Appellant at 48. Florida's signature requirement is four times as large as that in thirty-two states. The number required is twice as large as that required in forty-one states. Lest one get the mistaken impression that the eight remaining states model Florida's draconian restrictions, these states all have filing fees that are half of Florida's. *See supra* note 7. Of the seventeen states that rely only on signatures, moreover, not one requires more than 2000 signatures. *See* Brown, *supra* note 2, at 1305-06. The record clearly reflects that Florida's fee and signature requirements, separate and combined, are far and away the most severe in the country.

III. THE ELEVENTH CIRCUIT'S ASSUMPTION THAT ACCESS BY SOME PROVES ACCESS FOR ALL CONTRADICTS THE HOLDINGS OF THIS COURT AND CONFLICTS WITH DECISIONS IN THE THIRD CIRCUIT.

The Eleventh Circuit made much of the fact that "numerous" candidates had qualified to run in Florida's Congressional primaries. 155 F.3d at 1335 (App., *infra*, 6). It concluded that "since 1992, sixty-five candidates have qualified for Congressional seats in Florida's major party primaries by petition, which defeats Green's argument" that Florida's burden is severe. *Id.* at 1338; (App., *infra*, 14). Additionally, it held that because the number of candidates remained roughly even despite the fee's ranging from 5% to 7½% to 6% between 1990 and 1998, Green suffered no unnecessary burden. "Green present[ed] no evidence that raising the fee to seven and a half percent

reduced the total number of people qualifying for major party primaries or in any other manner unnecessarily burdened [Green's] constitutional rights. . . . " 155 F.3d at 1337 (App., *infra*, 12).

The Eleventh Circuit's holding is premised on two flawed assumptions: first, that ballot access restrictions are insignificant if they allow some candidates to qualify; second, that more severe burdens are permissible so long as they do not discourage additional candidates from running. The first of these assumptions – that access by some implies access for all – was recently rejected by the Third Circuit in *Council of Alternative Political Parties v. Hooks*, 121 F.3d 876 (3rd Cir. 1997). In striking down New Jersey's early filing deadline for minor parties, the Third Circuit stated:

> In *Anderson [v. Celebreeze]*, five independent candidates qualified for Ohio's 1980 presidential ballot. Neither there nor here can the fact that numerous candidates are able to overcome a burden on ballot access prevent a conclusion of unconstitutionality where that burden is not sufficiently justified by legitimate state interests.

Id. (citations omitted).

The second – that increased restrictions are permissible so long as they do not discourage more candidates – asks the wrong question. The issue is not whether charging less will increase the number. The issue is whether charging $10,020 (or alternatively demanding 4000+ signatures) is necessary to winnow the ballot by deterring frivolous candidates. Florida's election data makes it quite evident that increasing the fee to $10,020 was unnecessary and in fact achieved nothing at all in terms

of deterrence. In 1990, after all, when Florida's fee was $5370, only 45 candidates qualified for 38 primaries – just over one candidate per primary. Given that Florida's primaries were virtually uncontested in 1990, it is not surprising that increasing the fee to $10,020 did not cause a significant drop in the number of candidates.

Notwithstanding the Eleventh Circuit's characterization, Florida does not experience "numerous" candidates running for Congressional office. Instead, it has one of the lowest candidate-to-primary rates in the country. Only 21 of Florida's 92 Congressional primaries in 1994 and 1996 were contested. *See* Federal Elections Commission Report, Federal Elections 94: Election Results for the U.S. Senate and U.S. House of Representatives 52-56 (1995); Federal Elections Commission Report, Federal Elections 96: Election Results for the President, U.S. Senate and U.S. House of Representatives 92-95 (1997). Twenty-nine candidates ran in 46 primaries in Florida in 1998, leaving only a small handful of primaries contested. Far from justifying the conclusion that Florida has numerous candidates, the record shows the opposite.

Green has never contested the compelling nature of Florida's interest in winnowing its ballot. However, under any standard of scrutiny beyond simple rationality review, a state must make some showing that its restrictions are necessary to the ends it asserts. While a state has "considerable leeway to protect the integrity and reliability of . . . election processes generally," *Buckley*, No. 97-930, slip op. at 7, the "First Amendment requires [the Court] to be vigilant in making those judgments, to guard against undue hindrances to political conversations and the exchange of ideas." *Id.* In the end, the state

must show that its restrictions "are warranted by the state interests (administrative efficiency, fraud detection, informing voters) alleged to justify those restrictions." *Id.* Florida made no such showing here.

CONCLUSION

Florida's ballot access requirements are far and away the most onerous in the nation. This case thus presents the Court a unique opportunity to answer the remaining questions posed by *Bullock* and *Lubin*, and to resolve the conflicts with the Third, Fourth and Eighth Circuits. Petitioner respectfully requests that this Court grant certiorari to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-2042

D.C. Docket No. 96-CV-1143-T-23A

HENRY GREEN,

Plaintiff-Appellant,

versus

SANDRA BARRINGER MORTHAM, Secretary of State, State of Florida, in her official capacity,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(Filed Sep. 24, 1998)

Before TJOFLAT, COX and HULL, Circuit Judges.

HULL, Circuit Judge:

In this ballot access case, Appellant Henry Green challenges the constitutionality of Florida's alternative qualifying fee and signature petition requirements for ballot access in a Congressional primary election.[1] The magistrate judge held that Florida's alternative ballot

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[1] In this opinion, "Congressional" refers to only the United States House of Representatives.

access requirements in a Congressional primary election are constitutional.[2] We affirm.

I. BACKGROUND

In the Spring of 1996, Henry Green, a registered Democrat, desired to run for the Congressional seat from Florida's Tenth Congressional District. Green first had to win the Democratic primary to appear as the Democratic candidate on the general election ballot. Green had two ways to qualify for the Congressional primary ballot.

First, Green could pay a statutory qualifying fee equal to seven and a half percent of the annual salary for the office he sought, amounting to a $10,020 fee in 1996. Fla. Stat. Ann. § 99.092 (West Supp.1998).[3] This seven and

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[2] The parties consented to proceeding before the magistrate judge. *See* 28 U.S.C. § 636(c).

[3] Although amended in 1997, § 99.092 in 1996 provided:

> Each person seeking to qualify for nomination or election to any office, except a person seeking to qualify pursuant to § 99.095 and except a person seeking to qualify as a write-in candidate, shall pay a qualifying fee, which shall consist of a filing fee and election assessment, to the officer with whom the person qualifies, and any party assessment levied, and shall attach the original or signed duplicate of the receipt for his or her party assessment or pay the same, in accordance with the provisions of § 103.121, at the time of filing his or her other qualifying papers. The amount of the filing fee is 4.5 percent of the annual salary of the office. . . . The amount of the election assessment is 1 percent of the annual salary

a half percent qualifying fee represented the aggregate of three separate fees – a four and a half percent filing fee, a two percent election or trust fund assessment, and a one percent party assessment. *Id.*[4]

Alternatively, Green could file a petition with signatures of three percent of the registered Democratic voters in Florida's Tenth Congressional District. Fla. Stat. Ann. § 99.095 (West Supp.1998). [5] This petitioning alternative

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> of the office sought. . . . The amount of the party assessment is 2 percent of the annual salary.

Fla. Stat. Ann. § 99.092 (West Supp.1998).

[4] The filing fee component was divided between Florida's election campaign financing trust fund, the state's general revenue fund, and the candidate's political party. *Boudreau v. Winchester*, 642 So.2d 1, 1-2 (Fla. Dist. Ct. App. 1994); *McNamee v. Smith*, 647 So.2d 162 (Fla. Dist. Ct. App. 1994). The trust fund assessment went toward a quasi-judicial board to pursue complaints filed with the Division of Elections. *See Boudreau*, 642 So.2d at 1-2; *see also* Fla. Stat. Ann. § 106.24. The party assessment went to the candidate's political party. *Boudreau*, 642 So.2d at 2.

[5] Section 99.095 provides:

> A person seeking to qualify for nomination to any office may qualify to have his or her name placed on the ballot for the first primary election by means of the petitioning process prescribed in this section. A person qualifying by this alternative method shall not be required to pay the qualifying fee or party assessment required by this chapter.
>
> . . .
>
> . . . A candidate for any federal, state, county, or district office to be elected on less than a statewide basis shall obtain the signatures of a number of

required 4,077 signatures. After swearing an intent to qualify by petition, a candidate is given "forms in sufficient numbers to facilitate the gathering of [the requisite] signatures." Fla. Stat. Ann. § 99.095(2) (1982).

Green did not meet either requirement by the respective deadline. On May 21, 1996, the Florida legislature extended the deadlines to June 10 for a signature petition and to June 21 for paying the qualifying fee.[6] Green admits he made no effort to collect signatures and qualify by petition.

On June 12, 1996, Green filed this action against Florida's Secretary of State, Sandra Barringer Mortham ("the Secretary of State"), seeking a declaration that Florida's ballot access requirements for primary elections were unconstitutional, injunctions against enforcement of those requirements, and attorneys' fees and costs. Green also filed a motion for an injunction ordering that his name be placed on the 1996 Democratic primary ballot

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> qualified electors of the district, county, or other geographical entity equal to at least 3 percent of the total number of registered voters of the party by which the candidate seeks nomination that are registered within the district, county, or other geographical entity represented by the office sought, as shown by the compilation by the Department of State for the last preceding general election.

Fla. Stat. Ann. § 99.095(1), (3) (West Supp.1998).

[6] The deadlines were changed to alleviate any prejudice that might have resulted from another district court decision invalidating the configuration of Florida's Third Congressional District. *See Johnson v. Mortham*, 950 F.Supp. 1117, 1120 (N.D.Fla.1996).

for the Tenth District Congressional seat. The Secretary of State's Answer stipulated to the facts stated in Green's complaint and asserted that Florida's ballot access statutes for primaries were constitutional.

One day before the new deadline for paying the fee, the Democratic Congressional Campaign Committee and the Florida Democratic Party each donated $5,000 to Green's campaign. Green timely paid the $10,020 qualifying fee under protest. Unopposed in the Democratic primary, Green ran in the general election and was defeated by the twenty-six-year Republican incumbent.

Although withdrawing his motion for preliminary injunctive relief, Green continued his request for declaratory relief, a permanent injunction, and attorneys' fees and costs. Green later amended his complaint to seek a refund of his $10,020 qualifying fee on the basis that it could have been used to run his campaign.

While the parties' cross-motions for summary judgment were pending, the Florida legislature reduced the statutory qualifying fee from seven and a half percent to six percent of an elective office's salary. *See* 1997 Fla. Laws, ch. 97-13, § 11; Fla. Stat. Ann. § 99.092 (West Supp.1998). This reduced the fee from $10,020 in the 1996 Congressional primary to $8,016 for the 1998 primary.[7] Green's amended complaint challenged this statute as applied to him in 1996 and as would be applicable to him

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[7] The 1998 fee would have been $8,016 based on the Congressional salary as of July 1, 1997. However, on October 10, 1997, a 2.3% cost-of-living adjustment increased Congressional salaries from $133,600 to $136,672, resulting in a $8,200 filing fee for the 1998 primary.

in the 1998 primary. The parties amended their cross-motions accordingly. After a hearing, the magistrate judge upheld Florida's ballot access requirements as constitutional, denying summary judgment to Green and granting summary judgment to the Secretary of State. Green appeals.[8]

II. DISCUSSION

A. Qualification Statistics

Over the years, numerous candidates have run in Florida's party primaries for Congressional seats. From 1978 to 1988, Florida's qualifying fee was five percent of a Congressional salary. *See* 1977 Fla. Laws, ch. 77-175, § 6 (amended 1979). During those years, an average of forty-eight candidates qualified for each year of Congressional primaries. All candidates qualified by paying the five percent fee.

Between 1990 and 1998, the Florida legislature increased the qualifying fee first to six percent and then to seven and a half percent, but later decreased the fee back to six percent. *See* 1989 Fla. Laws, ch. 89-338, § 8 (increasing the fee to six percent effective January 1, 1990); 1991 Fla. Laws, ch. 91-107, § 1 (increasing the fee to seven and a half percent effective July 1, 1991); 1997 Fla. Laws, ch. 97-13, § 11 (decreasing the fee back to six

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[8] The magistrate judge first addressed ripeness, mootness, and standing concerns and held Green's claims justiciable. The Secretary of State did not cross-appeal.

percent effective January 1, 1998). The table below summarizes the recent qualification statistics for Congressional primary elections in Florida:

Year	Qualifying Fee (percent of salary)	Number of Candidates Qualifying[9]	Number Qualifying by Paying Fee	Number Qualifying by Petition
1990	6%	45	45	0
1992	7.5%	87	68	19
1994	7.5%	58	42	16
1996	7.5%	59	38	21
1998	6%	29	20	9

Notably, when Florida increased the fee to seven and a half percent in 1992, the number of Congressional candidates qualifying for party primaries did not decrease but increased to the highest number of all years for which the parties submitted evidence in this case. When the fee was decreased back to six percent in 1998, there was no accompanying rise in the number of candidates qualifying.

B. *Anderson's* Balancing Test

The Constitution provides that states may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives." U.S. Const. art I, § 4, cl. 1. The Supreme Court long has recognized that states have important and compelling interests in regulating the election process and in having ballot access requirements.

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[9] Florida had nineteen Congressional districts in the 1980s and twenty-three in the 1990s.

Burdick v. Takushi, 504 U.S. 428, 433 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788 & n. 9 (1983); *see also Lubin v. Panish*, 415 U.S. 709, 715 (1974); *Jenness v. Fortson*, 403 U.S. 431, 442 (1971). The states' compelling interests include maintaining fairness, honesty, and order, *Burdick*, 504 U.S. at 433, minimizing frivolous candidacies, *Lubin*, 415 U.S. at 715, and "avoiding confusion, deception, and even frustration of the democratic process," *Jenness*, 403 U.S. at 442. *See also Anderson*, 460 U.S. at 788 & n.9. These same Supreme Court cases also recognize candidates' constitutional rights under the First and Fourteenth Amendments to associate for political ends and to participate equally in the electoral process. *See Burdick*, 504 U.S. at 433; *Anderson*, 460 U.S. at 787-88; *Lubin*, 415 U.S. at 716-18; *Jenness*, 403 U.S. at 440. Therefore, in *Anderson*, the Supreme Court set forth the test for considering whether a state's ballot access requirements impermissibly infringe a candidate's constitutional rights.

The Supreme Court instructed that the courts first must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against "the precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights." *Anderson*, 460 U.S. at 789; *see also Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986). This Court has described the *Anderson* test as a "balancing approach" in several decisions. *See, e.g., Bergland v. Harris*, 767 F.2d 1551, 1553-54 (11th Cir. 1985) (describing *Anderson* as rejecting a "litmus-paper test" and adopting "the balancing

approach"); *Libertarian Party of Florida v. State of Florida*, 710 F.2d 790, 793 (11th Cir. 1983) (stating "the test is whether the legislative requirement is a rational way to meet this compelling state interest").

C. Post-*Anderson* Decisions

We would proceed immediately to applying *Anderson's* balancing test were it not for a more recent decision of this Court finding uncertainty about the standard to be applied. In *Duke v. Cleland*, 954 F.2d 1526 (11th Cir. 1992), this Court noted that although *Anderson* "deviated from the strict scrutiny model of analysis," the Supreme Court in *Norman v. Reed*, 502 U.S. 279 (1992), "returned to the traditional strict scrutiny analysis in striking down two provisions of an Illinois law that made it difficult for a new political party to obtain a position on the ballot." *Duke*, 954 F.2d at 1530 (citing *Norman v. Reed*). Thus, the *Duke* court found "uncertainty in the specific standard to be employed," but held that the plaintiffs seeking an injunction were unlikely to prevail "even under a strict scrutiny analysis." *Id.*

A few months after *Duke*, the Supreme Court decided *Burdick v. Takushi*, 504 U.S. 428 (1992), which sheds further light on the standard for analyzing state election laws that burden First and Fourteenth Amendment rights. In *Burdick*, the Supreme Court stated that "the mere fact that a State's system 'creates barriers . . . to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.' Instead, as the full Court agreed in *Anderson*, a more flexible standard applies." *Id.* at 433-34 (internal citations

omitted). After repeating the *Anderson* test, the Supreme Court in *Burdick* instructed specifically how to apply that test. Citing *Norman v. Reed*, the Supreme Court stated that when the First and Fourteenth Amendment rights "are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.' " *Id.* at 434. Then citing *Anderson* again, the Supreme Court continued that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' " on those constitutional rights, then " 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Id.*

A few months after *Burdick* this Court addressed the *Anderson* test again. In *Fulani v. Krivanek*, 973 F.2d 1539 (11th Cir. 1992), this Court stated that "the approach used by the *Anderson* Court can be described as *a balancing test* that ranges from strict scrutiny to a rational-basis analysis, depending on the circumstances." *Id.* at 1543 (emphasis added). After that description, this Court in *Fulani* also noted that in *Burdick v. Takushi*, "the Supreme Court reiterated the *Anderson* test and reaffirmed that 'to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently.' " *Id.* (quoting *Burdick*, 504 U.S. at 434).[10]

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[10] The *Fulani* court did observe that *Burdick*, *Tashjian*, and *Anderson* each involved challenges based solely on the First Amendment and not equal protection. *Id.* Nonetheless, the *Fulani* court cited this Court's prior decision in *Bergland v.*

After this review, we conclude that the *Anderson* balancing test still controls challenges to ballot access requirements and proceed to apply that test in the manner instructed in *Burdick*.

D. Florida's Statutes Are Reasonable and Nondiscriminatory

The first step is to determine whether Florida's alternative qualifying fee and signature petition requirements impose reasonable, nondiscriminatory restrictions or severe restrictions. We readily conclude Florida has adopted reasonable, nondiscriminatory ballot access restrictions for several reasons.

First, filing fees have long been considered a reasonable, non-discriminatory means of regulating ballot access so long as there is an alternative means of ballot access as exists in Florida's signature petition alternative. *See Lubin v. Panish*, 415 U.S. 709, 718-19 (1974); *Bullock v. Carter*, 405 U.S. 134, 144-45 (1972). This Court already upheld the constitutionality of Florida's filing fee in 1994 when it was four and half percent of the annual salary of the office sought, noting that "an alternative method is also available." *Little v. Florida Dept. of State*, 19 F.3d 4, 5 (11th Cir. 1994). In *Little*, this Court also noted that a filing fee of up to five percent of the salary of the state

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Harris, 767 F.2d 1551, 1552 (11th Cir.1985), and held that "[i]n this circuit, however, equal protection challenges to state ballot-access law are considered under the *Anderson* test." *Id.*

office sought had been upheld in *Adams v. Askew*, 511 F.2d 700, 704-05 (5th Cir. 1975).[11]

Second, conceding that a five percent qualifying fee has been held constitutional, Green presents no evidence that raising the fee to seven and a half percent reduced the total number of people qualifying for major party primaries or in any other manner unnecessarily burdened his constitutional rights given the petition alternative. Indeed, when the fee was lowered back to six percent in 1998, there was no concomitant increase in candidates qualifying. Thus, we agree with the Florida appellate courts that have held that Florida's qualifying fee of seven and a half percent of the annual salary of the office sought in 1996 is reasonable. *Boudreau v. Winchester*, 642 So.2d 1 (Fla. Dist. Ct. App. 1994) (upholding total seven and a half percent qualifying fee against challenge to its partial disbursement to candidate's party and to trust fund); *McNamee v. Smith*, 647 So.2d 162 (Fla. Dist. Ct. App. 1994) (same).

Turning to the petition alternative, the Supreme Court has upheld petition requirements more onerous than the three percent requirement at issue here. *Jenness v. Fortson*, 403 U.S. 431, 438-39 (1971) (finding it constitutional to require signatures from five percent of electorate within 180 days). Addressing Florida's ballot access restrictions in particular, this Court already has upheld

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[11] This Court adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981, and all Fifth Circuit Unit B decisions after October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981) (en banc); *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 33 (11th Cir.1982).

another section of Florida's election code that requires *minor* political parties to file a petition signed by three percent of the state's registered voters in order to have the names of its candidates placed on ballots for *statewide* offices. *Libertarian Party of Florida v. State of Florida*, 710 F.2d 790 (11th Cir. 1983) (upholding Fla. Stat. Ann. § 99.096(1) (West 1982)); *see also U.S. Taxpayers of Fla. v. Smith*, 871 F.Supp. 426 (N.D. Fla. 1993), *aff'd*, 51 F.3d 241 (11th Cir. 1995).

Thus, Florida's petition alternative for *major*-party candidates is likewise reasonable, especially under the particular facts here. In 1998, candidates had three months – or approximately ninety-six days – to collect signatures. Green needed to collect approximately fifty-two signatures per day. The magistrate judge aptly noted that Green could comply by asking five volunteers each to collect ten signatures a day. Moreover, Green admits that he never tried to collect signatures. Some *Libertarian* plaintiffs "testified they had not even attempted to undertake a petition drive because in their view the 3% requirement was simply impossible to meet." *Id.* at 794. Thus, this Court in *Libertarian* concluded that those plaintiffs' "[c]onclusory allegations cannot prevail." *Id.* Likewise, Green's conclusory allegations about the three percent petition requirement here do not show that the signature requirement is unreasonably burdensome.

We recognize that one distinction between *Libertarian* and Green's claims is that only registered Democratic voters in the Tenth Congressional District may sign Green's petition. Although the available pool of voters is smaller, the number of signatures required is also

smaller.[12] Green's petitioning efforts are eased by the limited geographic area in which eligible signers live. Green stresses several other candidates attempted petitioning but failed to obtain the requisite number of signatures. However, since 1992, sixty-five candidates have qualified for Congressional seats in Florida's major party primaries by petition, which defeats Green's argument.

Green also complains that Florida charges a verification fee of ten cents per signature or the actual cost of verification, whichever is less. Fla. Stat. Ann. § 99.097(4) (West Supp.1998).[13] However, this does not make Florida's petition requirement unreasonable or unduly burdensome for two reasons. First, a candidate also may collect fifteen percent more than the required number of signatures and thereby qualify to pay for only a random sampling of the signatures to be checked. Fla. Stat. Ann. § 99.097(2).[14] Second, the verification fee is waived for candidates who swear that the charges impose an undue burden on their resources. Fla. Stat. Ann. § 99.097(4).[15]

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[12] The plaintiffs in *Libertarian* needed 144,492 signatures statewide, *id.* at 792, whereas Green needed only 4,077 from the Tenth Congressional District.

[13] "The supervisor shall be paid the sum of 10 cents for each signature checked or the actual cost of checking such signature, whichever is less. . . . " Fla. Stat. Ann. § 99.097(4).

[14] "When a petitioner submits petitions which contain at least 15 percent more than the required number of signatures, the petitioner may require that the supervisor of elections use the random sampling verification method in certifying the petition." Fla. Stat. Ann. § 99.097(2).

[15] "However, if a candidate . . . cannot pay such charges without imposing an undue burden on personal resources or upon the resources otherwise available to such candidate . . . ,

After acknowledging Florida's charges for verifying signatures, this Court in *Libertarian* likewise pointed out that "Florida provides petitions free of charge," and that although "[c]ounty election supervisors charge 10 cents per signature to cover the costs of verifying the petitions, . . . they may use random sampling techniques which reduce the number of signatures checked and therefore the cost." *Libertarian*, 710 F.2d at 794. Like the plaintiffs in *Libertarian*, Green has "cited no case holding that states must provide free access to the ballot in all circumstances." *Id.*[16]

Having concluded that Florida's fee and petition alternatives impose reasonable restrictions on ballot access, we also conclude that the requirements are justified by the state's compelling objectives. As noted above, the Supreme Court long has emphasized the importance of restricting ballot access: "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organizations's [sic] candidate on the ballot – the [state's] interest, if no other, [is] in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness*, 403 U.S. at 442. Florida's strong regulatory interests are

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such candidate . . . shall, upon written certification of such inability given under oath to the supervisor, be entitled to have the signatures verified at no charge." Fla. Stat. Ann. § 99.097(4).

[16] After *Libertarian*, this Court held it was unconstitutional for Florida categorically to exclude minor parties from the waiver of the verification fee that was available to indigent major party candidates. *Fulani v. Krivanek*, 973 F.2d 1539, 1547 (1992). However, Green sought ballot access in a major party primary and thus the charges were waivable.

sufficient to justify the reasonable restrictions at issue here. *See Burdick*, 504 U.S. at 434 (explaining *Anderson* as holding that "when a state election law provision imposed only 'reasonable, nondiscriminatory restrictions' " then " 'the State's important regulatory interests are generally sufficient to justify' the restrictions"); *Libertarian*, 710 F.2d at 793 (noting that under *Burdick*, a "state's important regulatory interests are generally sufficient to justify reasonable restrictions").

E. Other States' Filing Fees and Petition Requirements

Green argues at length that this Court must find Florida's ballot access requirements unconstitutional because most other states either charge fees that are less than Florida's or require fewer signatures for petitions. We disagree. There is a range of fees and signature requirements that are constitutional, and the Florida legislature is free to choose its ballot access requirements from that constitutional spectrum. The fact that Florida may be at the high end of that range does not make its ballot access restrictions unconstitutional. The shortcomings of such a comparative approach were recognized in *Libertarian*:

> First of all, the argument that Florida's 3% requirement must be stricken as unconstitutionally burdensome because a majority of states protect interests similar to Florida's by imposing a lesser requirement is unavailing. A court is no more free to impose the legislative judgments of other states on a sister state than it is free to

> substitute its own judgment for that of the state legislature.

710 F.2d at 793-94 (internal citations omitted). In this case, as in *Libertarian*, this Court cannot impose the legislative judgments of sister states on Florida but instead must determine whether Florida's legislative judgment expressed in its ballot access requirements passes constitutional muster. It does.

III. CONCLUSION

We conclude that Florida's qualifying fee of seven and a half percent in 1996 and six percent in 1998 and alternative signature petition for ballot access for Congressional offices, are reasonable, nondiscriminatory restrictions, further compelling state interests, and do not unduly burden Green's constitutional rights. Therefore, the district court's entry of judgment for Defendant Secretary of State is AFFIRMED.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

HENRY GREEN,

Plaintiff,

vs.

Case No.
96-1143-CIV-T-23A

SANDRA MORTHAM, Secretary of State, State of Florida, in her official capacity,

Defendant.

_____/

ORDER

(Filed Dec. 24, 1997)

This is a primary election ballot access case. Plaintiff alleges the requirements that a would-be candidate must meet to appear on a Congressional primary election ballot in this state violate his right to associate freely with the political party of his choice and his right to equal protection under the law. After careful consideration, this court finds, however, that Florida's primary ballot access requirements pass constitutional muster.

I. Factual Background and Procedural History

Plaintiff brought this action pursuant to 42 U.S.C. § 1983 and the First and Fourteenth Amendments of the United States Constitution. This cause is now before the

court on the parties' cross motions for summary judgment (docs. 51 and 52) and the respective responses thereto.[1] The Defendant has stipulated that the facts material to this action are those alleged in the First Amended Complaint (See Defendant's motion for summary judgment (doc. 12) and her renewed motion for summary judgment (doc. 51)). Accordingly, the court can dispose of this case as a matter of law pursuant to Fed. R. Civ. P. 56.

The Plaintiff in this action is Henry Green ("Green"). Green is a registered Democratic voter in Pinellas County, Florida who, through a stroke of good fortune, became the sole candidate for the U.S. House of Representatives in the 1996 Democratic primary for the Tenth Congressional District.[2] Under the Florida election laws in place at the time, Green could have qualified for inclusion on the 1996 Congressional primary ballot in two ways. First, he could have paid a statutorily set filing fee equal to a percentage of the annual salary for the office he sought. Fla. Stat. ch. 99.092(1) (1995).[3] Second, Green could have appeared on the Democratic primary ballot if he obtained the signatures of 3% of the total number of the registered Democratic voters in the Tenth District. Fla. Stat. ch. 99.095(3) (1995). In 1996, this petitioning alternative

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[1] Pursuant to 28 U.S.C. § 636(c), the parties have consented to my jurisdiction over this matter (doc. 36).

[2] Green has also expressed a desire, by affidavit, to seek the same nomination in 1998.

[3] In 1996, when Mr. Green first sought access to the primary ballot, the filing fee was set at 7.5% of Congressional salary, which translated to $10,020.

would have required Green to obtain signatures from 4,077 registered Democrats in the Tenth District. Mr. Green did not meet either of these access requirements before their respective deadlines.[4]

On April 17, 1996, however, this court coincidently invalidated the configuration of Florida's Third Congressional District in the case styled *Johnson v. Mortham*, 950 F. Supp. 1117 (M.D. Fla. 1996). In so doing, the court cast doubt upon the validity of the boundaries of Florida's other Congressional districts. To alleviate any negative or unfair effects possibly caused by the court's decision in *Johnson*, the Florida legislature extended by approximately two months the deadlines for obtaining access to Congressional primaries statewide. The new deadline for qualifying through the submission of signatures was set for June 10, and a would-be primary candidate could qualify by paying the 7.5% fee on or before June 21, 1996. 1996 Fla. Laws ch. 96-192, § 8. Green only learned of this extension on June 4, through a memorandum circulated by the Defendant to local election supervisors.

Despite the extension of the filing deadlines, Green did not believe that he would be able to qualify for the primary. Consequently, he filed this action on June 12 challenging the constitutionality of Florida's primary ballot access requirements and seeking an injunction ordering that he be placed on the Tenth District Democratic primary ballot. On June 20, however, the day before the new deadline for qualifying by paying the qualifying fee

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[4] In 1996 Green made no attempt to qualify for the primary by satisfying the petitioning alternative.

ran, the Democratic Congressional Campaign Committee and the Florida Democratic Party each made unexpected $5,000 donations to Green. Green used these funds to pay the qualifying fee under protest. Green ran unopposed in the Democratic primary election but ultimately lost his bid for Congress to Rep. Bill Young, the 26-year Republican incumbent, in the general election.

In conjunction with paying the filing fee, Green withdrew his motion for preliminary injunctive relief and a subsequently filed motion for a temporary restraining order but maintained his claims challenging the constitutionality of the relevant laws. During the pendency of this action, and after the parties had filed their initial cross motions for summary judgment, the state legislature amended section 95.092(1), Florida Statutes, reducing the qualifying fee from 7.5% to 6% of the Congressional salary. 1997 Fla. Laws ch. 97-13, § 11. As a result, Plaintiff obtained leave to amend his complaint in order to attack both the constitutionality of the statute as it read and was applied to him in 1996 and as amended and applicable to the 1998 primary in which he plans to participate. After the Plaintiff amended his complaint, the parties renewed their motions for summary judgment.

II. Discussion

A. Mootness and Standing

The Plaintiff has standing to advance the claims asserted in the Amended Complaint. In her memorandum of law, the Defendant has not argued that Green's attack on Florida's 1996 primary ballot access laws was mooted by his participation in the relevant primary or by

the amendment of section 95.092(1), Florida Statutes, nor has Defendant asserted that Plaintiff lacks standing to bring a pre-enforcement challenge to the ballot access laws currently in place and applicable to the 1998 primaries. Although, substantively speaking, ballot access jurisprudence is widely inconsistent, it is a well-settled principle that given the brief duration of the election season ballot access cases are capable of repetition yet susceptible to evading review. Therefore, the fact that the election at issue has come and gone does not moot a plaintiff's claims. *Norman v. Reed*, 502 U.S. 279, 287 (1992); *Brown v. Chote*, 411 U.S. 452, 457 n.4 (1973). More specifically, the Supreme Court has held that a plaintiff who pays a filing fee and participates in an intervening election does not moot his legal challenge to the constitutionality of the paid fee where there is no indication that the defendant will cease collecting it in the future. *Morse v. Republican Party of Virginia*, 116 S.Ct. 1186, 1213 n.48 (1996); *see also, American Civil Liberties Union v. The Florida Bar*, 999 F.2d 1486, 1496 (11th Cir. 1993) (holding that an intervening judicial election did not moot the plaintiff's First Amendment challenge to a Florida Bar disciplinary rule prohibiting judicial candidates from publicly criticizing their opponents). This is particularly true where, as here, the Plaintiff intends to participate in a subsequent election, thereby subjecting himself to the same process or requirements at a later date. *Chandler v. Miller*, 117 S.Ct. 1295, 1300 n.2 (1997).

Relatedly, the fact that the state legislature amended the Florida Statutes during the pendency of this action, reducing the filing fee at issue by 1.5%, does not moot the

Plaintiff's claims. "The well settled rule [is] that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice. . . . " *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 113 S.Ct. 2297, 2301 (1993); *see also, The Florida Bar*, 999 F.2d at 1495 (holding that a case or controversy remains after a defendant voluntarily ceases the allegedly improper conduct but remains free to resume it at any time). Finally, Green is not prohibited from challenging Florida's current primary ballot access requirements though not yet subject to them. Plaintiff has testified by affidavit that he intends to seek the Democratic nomination for the Tenth District's house seat in 1998, which will subject him to the current ballot access requirements. Green, therefore, has standing to challenge the law as currently written. *The Florida Bar*, 999 F.2d at 1493; *Minnesota Citizens Concerned for Life v. Federal Elections Commission*, 113 F.3d 129, 131 (8th Cir. 1997); *Vannatta v. Kresling*, 899 F. Supp. 488, 493 (D. Oregon 1995).

B. Florida's Primary Election and Primary Ballot Access Schemes

As background, it should be noted that Florida uses a closed primary election system to nominate candidates for Congress. That is, a Florida elector can only vote the official primary ballot of the political party designated in that elector's voter registration. Fla. Stat. ch. 101.021 (1995). First primary elections are held on the Tuesday nine weeks prior to a November general election. The candidate who receives a majority of the votes in a

party's Congressional primary election becomes that party's candidate in the general election. Fla. Stat. Ann. § 100.061 (West 1997). If no primary candidate receives a majority of the votes, a runoff is held. *Id.*

In this case, Green is attacking the constitutionality of the provisions of Florida's election code which control how a person can become a candidate in a primary election. As outlined above, there are two alternative ways in which a person, otherwise qualified to run for office, may be included on a primary election ballot. One way is by paying a statutorily set qualifying fee. Currently, section 99.092, Florida Statutes provides, in pertinent part, that:

> Each person seeking to qualify for nomination or election to any office, except a person seeking to qualify pursuant to s. 99.095 and except a person seeking to qualify as a write-in candidate, shall pay a qualifying fee, which shall consist of a filing fee and election assessment, to the officer with whom the person qualifies, and any party assessment levied. . . . The amount of the filing fee is 3 percent of the annual salary of the office. The amount of the election assessment is 1 percent of the annual salary of the office sought. The election assessment shall be deposited into the Elections Commission Trust Fund. The amount of the party assessment is 2 percent of the annual salary. . . .

1997 Fla. Laws ch. 97-13, § 11. As applied to a person seeking access to the Congressional primary ballot in the

upcoming 1998 primaries, section 99.092 requires the payment of a $8,016 qualifying fee.[5]

The second way to obtain access to a primary ballot is by gathering the signatures of three percent of the voters who are registered in the area of representation as members of the party whose nomination the would-be candidate seeks. In this regard, section 99.095 currently provides, in pertinent part, as follows:

> (1) A person seeking to qualify for nomination to any office may qualify to have his or her name placed on the ballot for the first primary election by means of the petitioning process prescribed in this section. A person qualifying by this alternative method shall not be required to pay the qualifying fee or party assessment required by this chapter. A person using this petitioning process shall file an oath with the officer before whom the candidate would qualify for the office stating that he or she intends to qualify by this alternative method for the office sought. . . . The oath shall be filed at any time after the first Tuesday after the first Monday in January of the year in which the first primary is held, but prior to the 21st day preceding the first day of qualifying period for the office sought . . . . No signatures shall be obtained by a candidate on any nominating petition until the candidate has filed the oath required in this section. . . .

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[5] The 7.5% qualifying fee applicable to the 1996 Congressional primary required payment of a $10,040 [sic] qualifying fee.

> (3) When the candidate has field [sic] the oath prescribed in subsection (1), the candidate may begin to seek signatures on petitions supporting his or her candidacy. Only signatures of electors who are registered in the political party by which the candidate seeks to be nominated and who are registered to vote in the . . . district . . . represented by the office sought shall be counted toward obtaining the minimum numbers of signatures. . . . A candidate for any . . . district office to be elected on less than a statewide basis shall obtain the signature of a number of qualified electors of the district . . . equal to at least 3 percent of the total number of registered voters of the party by which the candidate seeks nomination that are registered within the district . . . as shown by the Department of State for the last preceding general election.

By its express terms, section 99.095 provides an alternative qualifying method to section 99.092, in that it allows a potential candidate to qualify for a primary ballot without paying any portion of the fee. As applicable to the upcoming Congressional Democratic primary in the Tenth District, a person seeking access to the ballot under this section will need to collect approximately 4,700 signatures.[6]

C. Threshold Considerations

In his Amended Complaint, Green asserts that the provisions of the Florida Statutes set forth above violate

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[6] State of Florida Dept. of State, Division of Elections, *1998 Candidate Petition Requirements*, at 24.

his First Amendment right to associate freely with the political party of his choice. Green also claims that sections 99.092 and .095, Florida Statutes infringe upon his Fourteenth Amendment right to equal protection because they impermissibly grant preferential treatment to "affluent" candidates. Plaintiff has asserted these constitutional claims in an eight count amended complaint organized along the following lines: a) four First Amendment claims, one directed to each of the two provisions at issue as they applied to Plaintiff in 1996 and as they currently exist (Counts II, IV, VI, and VIII) and b) four Fourteenth Amendment claims, one directed to each of the two provisions at issue as they applied to him 1996 and as they currently exist (Counts I, III, V, and VII). Consistent with the organization of his amended complaint, in his motion for summary judgment, Plaintiff addresses the constitutionality of sections 99.092 and 99.095 separately, thus implicitly encouraging the court to do the same. More than a mere logistical detail, the perspective this court adopts when reviewing the statutory provisions at issue – either operating separately or in tandem – is a critical threshold issue to this particular case.

The Plaintiff's discrete approach is inconsistent with the logic and the teachings of the Supreme Court's ballot access opinions which direct lower courts to consider ballot access schemes in their entirety when passing on their constitutionality. A reviewing court must determine whether "the totality of the restrictive laws taken as a whole imposes a burden on voting and associational rights." *Williams v. Rhodes*, 395 U.S. 23, 34 (1968); *see also, Storer v. Brown*, 415 U.S. 724, 737 (1974) (stating that "a number of facially valid election laws may operate *in*

tandem to produce impermissible barriers to constitutional rights" (emphasis added)); *Jenness v. Fortson*, 403 U.S. 431 (1971) (in which the Court upheld the specific ballot access requirements at issue after satisfying itself that other portions of Georgia's election laws ensured reasonably open access to the ballot); *Burdick v. Takushi*, 504 U.S. 428, 438 (1992) (holding that "Hawaii's prohibition on write-in voting, considered as part of an electoral scheme that provides constitutionally sufficient ballot access, does not impose an unconstitutional burden upon the First and Fourteenth Amendment rights of the State's voters"); *Libertarian Party of Florida v. State of Florida*, 710 F.2d 790 (11th Cir. 1983) (considering the relevant ballot access requirements together in determining whether a 3% signature requirement for minor parties to be placed on the general presidential election ballot was constitutional).

Perhaps most significant to this case, a global approach is inherently mandated by the Supreme Court's qualifying fee decisions. In *Lubin v. Panish*, the Court held that "in the absence of a reasonable *alternative means* of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay." 415 U.S. 708, 718 (1974) (emphasis added); *see also, Bullock v. Carter*, 405 U.S. 134, 149 (1972) (holding same); *Little v. Florida Dept. of State*, 19 F.3d 4, 5 (11th Cir. 1994) (holding that a filing fee as part of a ballot qualification scheme does not run afoul of the Constitution where an alternative qualifying method is also available). In directing courts to consider whether there is a reasonable alternative means of access to the qualifying fee, the Supreme Court requires reviewing

courts to analyze ballot access schemes macroscopically. Certainly, *Lubin* and *Bullock* do not mean that an alternative to paying a qualifying fee can only be "reasonable" if it is included in the same section, subsection, or sentence of the statute as the qualifying fee requirement. Rather, Plaintiff correctly frames the issues when, in his memorandum, he asks: can an onerous filing fee requirement be saved by a petition/signature alternative?[7]

D. Plaintiff's First Amendment Claims

In this case, Green argues that sections 99.092 and .095 infringe upon his right to associate with the Democratic party by unduly hindering his ability to become a primary candidate. Although it is a right protected by the First Amendment, the right to associate with a political party by becoming its candidate for public office is not considered "fundamental." *Clements v. Fashing*, 457 U.S. 963 (1982), *citing*, *Bullock*, 405 U.S. at 143.[8] On the other

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[7] Plaintiff later states in his memorandum that *Lubin* and *Bullock* "left unanswered whether a reasonable petition/signature alternative might cure the unconstitutional obstacle presented by grossly excessive filing fees." Quite to the contrary, *Lubin* and *Bullock* both suggest that a reasonable alternative to paying the filing fee may render an otherwise unconstitutional ballot access law constitutional. In *Lubin*, the Supreme Court even offered a reasonable petition/signature alternative as just such a saving grace. 415 U.S. at 719.

[8] It is well established that the type of infringement of which Green complains about has an effect on voters as well as the potential candidate. "[T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters." *Bullock*, 405 U.S. at 143. Ballot

side of the coin from a would-be candidate's associational rights is the state's interest in keeping elections fair, honest, and orderly. "As the Court has expressly noted, a state's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions." *Dixon v. Maryland State Admin. Bd. of Elections*, 878 F.2d 776, 779 (4th Cir. 1989).

With these countervailing rights and interests in mind, the Supreme Court developed a balancing test to apply in determining whether a ballot access law violates the First Amendment rights of candidates.

> [The court] must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justification for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all

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access restrictions tend to limit the field of candidates from which voters might choose, which dampens their associational rights as well as their right to effectively cast their vote. *Id.*, *Anderson v. Celebrezze*, 460 U.S. 780, 786-787 (1983). The Plaintiff has, however, made no effort to vindicate any right of Tenth District Democratic voters. In fact, at the hearing of the parties' cross motions for summary judgment, Plaintiff's counsel specifically stated that none of Green's claims were based on an alleged injury to the rights of voters. Thus, in deciding the motions before it, the court will not consider the impact of sections 99.092 and .095 on Tenth District Democratic voters.

> these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Clebrezze, 460 U.S. 780, 789 (1983).

Accordingly, this court must first "consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendment that the plaintiff seeks to vindicate." *Id.* The court agrees with the Plaintiff that sections 99.092 and .095, Florida Statutes impose obstacles to obtaining a spot on a primary election ballot. Conditioning primary ballot access upon either paying a qualifying fee or obtaining the requisite number of signatures has at least some detrimental effect on Green's right to associate with the party of his choice through seeking its nomination for Congress. Under Florida law, Green cannot become a Congressional primary candidate simply by declaring himself to be one.

On the other hand, the court finds that the magnitude of this injury is moderate at worst. Again, the operation of sections 99.092 and .095 do not completely prohibit Green from exercising his right to associate with the Democratic party by becoming a candidate in its primary. Unlike the early filing deadline at issue in *Anderson*, which absolutely prohibited a candidate from seeking an independent party's nomination for President after a date far in advance of the general election, the instant ballot access requirements only make the exercise of Green's associational rights more difficult by imposing alternative conditions to inclusion on the primary ballot – in this case either paying $8,016 ($10,020 in 1996) or obtaining the signatures of approximately 4,700 eligible petitioners (4,077 in 1996).

Although $8,000 is not an insignificant amount of money for most people, Plaintiff can become a primary candidate without paying a dime if he satisfies the petitioning requirement. By operation of Florida's election code, in 1998, Plaintiff will have approximately 3 months or some 96 days to obtain the requisite signatures.[9] Since the Plaintiff will need about 4,700 signatures to access the Tenth District Democratic primary ballot in 1998, a mere five volunteers collecting only 10 signatures a day for Plaintiff would satisfy this requirement. Acting alone, the Plaintiff will only need to collect 52 signatures a day. given the relatively limited geographic area in which eligible petitioners live in this case, and the ease with which they may be identified and targeted through the use of voter registration rolls, the petitioning requirement hardy seems unreasonable.[10]

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[9] State of Florida Dept. of State, Division of Elections, *1998 Election Dates to Remember,* at 3.

[10] Numerous courts, including the Supreme Court, have found more onerous signature requirements constitutional. *See, e.g., Storer,* 415 U.S. at 740 (suggesting that collecting 325,000 signatures in 24 days (13,542 signatures/day) in order for an independent presidential candidate to access a general election ballot is not constitutionally infirm); *LaRouche v. Kezar,* 990 F.2d 36, 41 (2nd Cir. 1993) (holding that a requirement of collecting 466 signatures a day in order to access a presidential primary ballot is constitutional); *Andress v. Reed,* 880 F.2d 239, 242 (9th Cir. 1989) (holding 10,000 signatures in 45 days to access ballot for statewide office is constitutional); *U.S. Taxpayers of Florida v. Smith,* 871 F. Supp. 426, 433-34 (N.D. Fla. 1993), *aff'd,* 51 F.3d 241 (11th Cir. 1993) (noting that a requirement of collecting 30 signatures per day to be placed on a general election ballot as a candidate for president is not unreasonable). Although the cited opinions do not necessarily address ballot access requirements

As the Plaintiff's own evidence indicates, numerous individuals have complied with Florida ballot access requirements over the years and fully exercised their right to associate with a major party by running in its Congressional primary. This is true even when Florida's primary qualifying fee was at its 7.5% zenith between 1991 and 1996 and the petitioning requirement was the same as it is now (3%). In 1992, 43 Democrats and 44 Republicans qualified to participate in Congressional primaries statewide. In 1994, 19 Democrats and 39 Republicans became primary candidates for Congress in Florida. In 1996, Congressional primary candidates numbered 29 Democrats and 30 Republicans. Significantly, the total number of Congressional primary candidates from each party in 1992, the first election year in which the qualifying fee was 7.5%, was the highest of all the years for which the parties submitted evidence in this case.

Moreover, the total number of primary candidates during the years in which the qualifying fee was 7.5% do not significantly differ from the totals for past years when the qualifying fee was lower. For instance, from 1978 to 1988, when the qualifying fee was 5%, the average number of Democratic Congressional primary candidates was approximately 25 per year statewide and the average number of Republican candidates was roughly 23 candidates annually. In 1990, with a 6% qualifying fee in effect, 19 Democrats and 26 Republicans obtained access to their

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for congressional primaries, the signature requirements considered by the reviewing courts are so much more burdensome than the one before me that any difference between the scope and nature of the election is irrelevant.

respective Congressional primary ballots. Although this statistical evidence admittedly fails to account for those who may have wanted to run in a Congressional primary over the years but failed to obtain access to the ballot, it does indicate that, despite increases in the qualifying fee and growing voter populations in Florida, it has been, and remains, possible for a significant number of diligent people to successfully exercise their right to associate with the political party of their choice by participating in its primary. Of course, what this particular statistical evidence most poignantly suggests is that overall it was no harder to obtain access to a Congressional primary ballot in 1996 that [sic] it was in 1978, 1986, 1990, or any other election year for the past 20 when the qualifying fee ranged from 5 to 7.5%.[11]

Further, the fact that no candidate obtained access to the primary ballot using the signature alternative until 1992, when the filing fee was increased from 6 to 7.5%, is irrelevant at best for the Plaintiff and may in fact militate against him. Again, the court believes that Florida's ballot access alternatives should be viewed in tandem when

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[11] This is exactly the point made by the Eleventh Circuit in *Libertarian Party of Florida*. As the *Libertarian Party* court explained, all ballot access requirements, whether they be dollar figures or signatures, are arbitrarily drawn. Under Plaintiff's argument and evidence, a 5% fee would be just as unconstitutional as the 7.5% figure since roughly the same number of candidates attained access to Florida's Congressional primaries when the fees varied between these percentages of Congressional salary. Under the circumstances, courts must exercise caution not to play piecemeal legislator, whittling a state's filing fee down to nothing through a series of rulings. *Libertarian Party of Florida*, 710 F.2d at 793.

determining their constitutionality. As noted above, the consideration is whether "the totality of the restrictive laws taken as a whole imposes a burden on voting and associational rights." *Williams*, 395 U.S. at 34. Thus, how frequently one ballot access alternative is used relative to the other simply does not matter so long as the law in its entirety does not overly burden a would-be candidate's associational rights. That having been said, the fact that an increasing number of candidates obtained access to Congressional primary ballots between 1992 and 1996 using the petitioning alternative only goes to show that it is a realistic option to paying a larger filing fee, in that a potential candidate may choose to use it and ultimately satisfy its conditions. Accordingly, the injury inflicted on Green by Florida's ballot access requirements, including an optional filing fee as high at 7.5%, seems no more than moderate.

Under the *Anderson* balancing test, the court is to now "identify and evaluate the precise interest put forward by the state as justification for the burden imposed by its rules." *Anderson*, 460 U.S. at 789. In passing judgment, however, a reviewing court must also consider the strength and legitimacy of the state's interests and the extent to which those interests make it necessary to burden the plaintiff's rights. *Id.*

In this case, the state has claimed two interests supporting its primary ballot access requirements: 1) to assure ballot integrity (the seriousness of the candidates) and 2) to defray election costs. (See Defendant's response to Plaintiff's Interrogatory No. 23). The Supreme Court has approved both of these goals as state interests worthy of advancement. *Bullock*, 405 U.S. at 145-48; *Lubin*, 415

U.S. at 712-13; *Jenness*, 403 U.S. at 442; *see also, Dixon*, 878 F.2d at 783. Courts appear to consider the former of these two interests as particularly strong, even at the primary election stage. As the Supreme Court explained in *Lubin*

> [t]he role of the primary election process . . . is underscored by its importance as a component of the total electoral process and its special function to assure that fragmentation of voter choice is minimized. That function is served, not frustrated, by a procedure that tends to regulate the filing of frivolous candidates. A procedure inviting or permitting every citizen to present himself to the voters on the ballot without some means of measuring the seriousness of the candidate's desire and motivation would make rational voter choices more difficult because of the size of the ballot and hence would tend to impede the electoral process. . . . That 'laundry list' ballots discourage voter participation and confuse and frustrate those who do participate is too obvious to call for extended discussion.

415 U.S. at 715.

As for defraying the costs associated with a primary election, the Supreme Court has taken a more skeptical view of this interest than it has of assuring candidate legitimacy and consequently has taken a more active hand in limiting states' efforts to fund elections through collecting filling fees. For instance, in *Bullock*, the Supreme Court cautioned states from attempting to saddle candidates and their financial contributors with the entire cost of holding a primary election. 405 U.S. at 147-48 & n. 29. Nevertheless, *Bullock's* caveat is of limited application in this case because Florida's ballot access

scheme serves state interests beyond simply paying for the primary and assuring that only serious candidate [sic] appear on the primary ballot.[12]

As the preamble to section 99.092, Florida Statutes states, the law is also intended to strengthen the integrity of the election process by promoting campaign finance reform and through establishing the public funding of political campaigns. 1991 Fla. Laws ch. 91-107. This claimed legislative purpose is further evidence [sic] by the operation of Florida's election code. The current 6% qualifying fee is, in fact, the aggregate of three separate fees – a 3% filing fee, a 2% election assessment, and a 1% party assessment. 1997 Fla. Laws ch. 97-13 § 11. Although the disbursement of these various fees is rather convoluted, the bottom line is that a large portion of the total money collected as qualifying fees appears to find its way back to the party whose nomination the candidate seeks, *Id.* at § 14, while another portion goes to covering the expenses of the Florida Elections Commission, a quasi-judicial board who investigates and hears administrative complaints filed with the Division of Elections. *Id.* at § 11 and Fla. Stat. Ann. § 106.24 (West 1997). Although, at the

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[12] The law at issue in *Bullock* required primary candidates to pay a mandatory qualifying fee to the county executive committee of the political party conducting the election, who was also responsible for determining the amount of the fee. In setting the amount of the fee, the law required the committee to make an estimate of the total cost of the subject primary and to apportion that cost among the various candidates by collecting a filing fee. In short, the Texas law at issue in *Bullock* required the payment of a mandatory filing fee which was obviously intended to fund the entire cost of conducting a primary election.

hearing of their motions, neither party could say exactly what percentage of the total qualifying fee is actually used to defray primary election costs, it appears from a reading of the Florida Statutes to be only a relatively small fraction.

Thus, the Plaintiff's claim that Florida's qualifying fee is only as high as it is because it is unconstitutionally designed to cover all of the direct costs associated with conducting primary elections is simply wrong, while the state's explanation that the qualifying fee constitutionally "defrays" primary election expenses is dramatically oversimplified. All things considered, sections 99.092 and .095, appear to advance the state's interest is funding the state administration and regulation of elections, actually leveling the playing field between "affluent" and "non-affluent" candidates by providing for the public funding of political campaigns within the limitations imposed by the First Amendment, and assuring candidate seriousness. The Plaintiff has not even suggested that the bulk of these particular state interests are constitutionally questionable, and the court agrees with the Defendant and the Florida legislature that they are, in fact, compelling.[13]

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[13] At the hearing of the parties' motions, Plaintiff's counsel stated that he was not challenging the constitutionality of Florida's efforts to publicly finance political campaigns. Rather, the Plaintiff simply complains of the "extraction" of the qualifying fee and the resulting burden that it imposes. Nevertheless, the public financing of political campaigns is one of the state interests advanced by the laws he is attacking. Consequently, the Plaintiff cannot, under any legal analysis, avoid considering the propriety of public campaign financing altogether.

Ultimately, sections 99.092 and .095, acting in tandem, do not significantly dampen Green's right to associate with the party of his choice by seeking its nomination for Congress. The minor burdens imposed on Green are necessary and well justified by the strong interests advanced by the state in enacting sections 99.092 and .095. Accordingly, sections 99.092 and 99.095 Florida Statutes, both as they read and were applied to Green in 1996 and as currently written and applicable to the 1998 Congressional primaries, are not violative of the First Amendment.

E. Plaintiff's Equal Protection Claims

Plaintiff also claims that sections 99.092 and .095, Florida Statutes violate his equal protection rights because they discriminate between "affluent" and "non-affluent" candidates. Plaintiff's equal protection claims are plagued by profound problems. First, the Plaintiff completely ignores the hard threshold question of whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged "non-affluent" candidates cannot be defined in customary equal protection terms; that is, they are not specifically identifiable as is the class in the Libertarian party cases such as *Anderson*. *See San Antonio School District v. Rodriguez*, 411 U.S. 1, 19 (1972) (discussing the problems posed by claimed discrimination against an amorphous "economically disadvantaged" class). Second, as noted above, the right to associate with a political party by becoming its candidate for public office is not fundamental. *Clements*, 457 U.S. at 963, *citing*, *Bullock*, 405

U.S. at 143.[14] Finally, Florida's petitioning alternative provides an option to paying the qualifying fee that is no way related to wealth.

These problems are fatal to Green's equal protection claim. With respect to the existence of a non-monetary alternative to a [sic] paying a fee to exercise a constitutional right, the Supreme Court explained in its *San Antonio School District* opinion that

> "individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an *absolute deprivation* of a meaningful opportunity to enjoy that benefit." 411 U.S. at 20 (emphasis added).

As the Court further explained, the bulk of its wealth-based equal protection jurisprudence up to that time hinged upon whether the state had provided some "adequate substitute" or "reasonable alternative" to paying a substantial sum of money in order to exercise a particular right. *Id.* at 21-22. Where no less expensive or non-monetary alternative was available, the challenged fee or charge was generally declared unconstitutional because it

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[14] Although the Supreme Court recently characterized this right as "basic" in *M.L.B. v. S.L.J.*, 117 S.Ct. 555, 568 (1996), "basic" is not synonymous with "fundamental" which is a term of art in equal protection jurisprudence. Further, *M.L.B.* is not a ballot access or voting case, and the Court's characterization of the right to candidacy as basic in that opinion seems, insignificantly, overstated.

absolutely deprived those who could not pay it of a constitutional right. Most significantly, this general rule lies at the heart of the Court's decisions in *Lubin*, *Bullock*, and the Eleventh Circuit's decision in *Little*.

In this case, Green argues that the petitioning alternative is unreasonable in part because, like the qualifying fee, it costs too much to satisfy. In other words, Green contends that only the "affluent" can comply with the signature alternative. In support of this argument, Plaintiff submitted the affidavit of Richard Arnold, CEO of a for-profit corporation called Voter Outreach, Inc. ("Voter Outreach"). Voter Outreach is in the business of obtaining signatures from voters across the country in order to satisfy the petitioning requirements for public referenda and political campaigns. In his affidavit, Arnold testifies that Voter Outreach's "normal charge" for soliciting signatures for political campaigns is between $.85 and $2.00 per signature. Based on this testimony, Plaintiff argues that comfortably complying with section 99.095's signature alternative may cost over $9,000, which is more than Florida's current 6% qualifying fee and much more than most other states' fees.

This argument is entirely founded, however, on the assumption that the only way to successfully satisfy the signature requirement is to hire Voter Outreach or a similar *for-profit* company. Plaintiff presumes that volunteerism and grassroots politics is totally dead. The court is not that cynical. As explained above, the signature alternative could be met by rallying only a small force of volunteers to collect just a handful of signatures daily throughout the petitioning period. Although such an effort may impose some insignificant opportunity costs

on those collecting signatures, including the would-be candidate, and may entail some direct expenses, for example whatever fee the local election authority may charge for a list of registered voters and certain transportation expenses, accessing a primary ballot by petition does not require paying a for-profit company thousands of dollars to collect signatures as Plaintiff suggests.

Also unpersuasive is Plaintiff's argument that the section 99.095 is an unreasonable alternative to paying the qualifying fee because the number of signatures required is greater than that required by other states. It should go without saying that this court is in no way bound by the legislative pronouncements of other states, nor is this court free to impose the legislative choices of Georgia, Maryland, or New York on Florida lawmakers. *Libertarian Party of Florida*, 710 F.2d at 793-94.[15] For these

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[15] In encouraging the court to look to other state's ballot access requirements, Plaintiff has cited to *Rockefeller v. Powers*, 917 F. Supp. 155, 160 (E.D.N.Y 1996), which states that "[t]he first indication a 5% . . . figure is unduly harsh is provided by the evidence of other states' practices." *Rockefeller* is, however, a presidential primary case, which distinguishes it from the instant case with respect to the importance of other states' ballot access requirements. As the district court explained in *Rockefeller*, "a presidential primary requires a kind of campaign that is very different from an ordinary campaign for local office. In a national presidential campaign, ballot access restrictions that require enormous outlays of money and manpower will lead candidates to concentrate their resources in other states where the return on their investment, measured in terms of potential delegates and national exposure, will be greater per dollar spent. Thus, to prevent candidates from competing in a certain state, the state legislature need not adopt access restrictions that are, in the abstract, insurmountable. Instead, it

reasons, the court concludes that the signature alternative is reasonable and, consequently, that Florida's primary ballot access requirements do not violate Green's Fourteenth Amendment right to equal protection, nor did they cause such a constitutional violation with respect to the 1996 primary election.

F. Summary

Ballot access cases do indeed require courts to make difficult judgments. Judicial analyses vary greatly depending not only on the type of ballot access provision at issue but also based on the right allegedly violated as well as the type of election at issue. Ultimately, a district court must be mindful of "whether the challenged laws 'freeze' the status quo." *Jenness*, 403 U.S. at 439. In passing judgment on the challenged laws, it is essential to view them in a realistic light. *Anderson*, 405 U.S. at 143; *American Party of Texas v. White*, 415 U.S. 767, 783 (1974). In the final analysis, the question in these cases generally becomes whether a state's ballot access requirements impose unreasonable conditions upon becoming a candidate. *Libertarian Party of Florida*, 710 F.2d at 793, *citing*, *Anderson*, 460 U.S. at 790. As the [sic] explained above, Florida's ballot access requirements are not unreasonable. In their application, the provisions at issue appear to allow a politically healthy number of candidates to access Congressional primary election ballots.

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need only adopt restrictions that are substantially more burdensome than those adopted by other states." *Id.* Therefore, in such cases, what other states do may be of some significance, but not here.

III. Conclusion

For the foregoing reasons it is hereby

ORDERED:

1. The Plaintiff's Renewed Motion for Summary Judgment (doc. 52) is **DENIED;**

2. The Defendant's Renewed Motion for Summary Judgment (doc. 51) is **GRANTED; and**

3. The clerk of the court is directed to enter a separate final judgment consistent with this order and to close the file on this matter.

DONE AND ORDERED at Tampa, Florida on December 23, 1997.

/s/ Mark A. Pizzo
MARK A. PIZZO
UNITED STATES
MAGISTRATE JUDGE

cc: Counsel of Record

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 98-2042

HENRY GREEN,

Plaintiff-Appellant,

versus

SANDRA BARRINGER MORTHAM, Secretary of State, State of Florida, in her official capacity,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

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(Filed Nov. 25, 1998)

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, _____ F. 2d _____).

Before: TJOFLAT, COX and HULL, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate

Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hull
UNITED STATES CIRCUIT JUDGE